

THE
TOP NINE
OF
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A Review of Second Circuit Civil and Criminal
Cases Affecting Connecticut

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Second Circuit decided many significant cases in 2009.

This article focuses only on those cases from, or significantly affecting, the District of Connecticut.

Beyond geography, our selection criteria were completely subjective, and the nine cases discussed here (five civil and four criminal) reflect only our opinion of the decisions that might be most interesting to Connecticut practitioners. With that caveat, we begin with the five civil decisions.

Five Civil Cases

On September 21, 2009, the court issued a long-awaited decision in *Connecticut v. American Electric Power Co.*,¹ on the viability of litigating tort claims based on global warming. Plaintiffs—eight states (including Connecticut), one municipality (New York City), and three land trusts—sued six electric power corporations, asserting that defendants’ contributions to global warming created a public nuisance. Plaintiffs sought an order forcing defendants to cap and then reduce their carbon dioxide emissions. The District Court for the Southern District of New York dismissed the complaints on political question grounds, holding that the complaint “touched on so many areas of national and international policy” and “revealed the transcendently legislative nature of this litigation.”² In a lengthy decision

by Judge Peter W. Hall, the Second Circuit reversed.

A significant victory for plaintiffs in environmental cases, the Second Circuit first held that the nuisance claims were not barred by the political question doctrine. Applying the seminal test for justiciability from *Baker v. Carr*,³ the court found none of the factors from that case were satisfied. In so concluding, the court rejected defendants’ conclusory statements regarding the broad sweep of plaintiffs’ claims, and emphasized the fact that “federal courts have successfully adjudicated complex common law public nuisance cases for over a century.”⁴ According to the court, although there are many national and international political efforts to curtail global warming, “not every case with political overtones is non-justiciable.”⁵ Indeed, the court held that

“[g]iven the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislative prerogatives than it can decline to decide matters within its jurisdiction simply because such matters may have political ramifications.”⁶ The Second Circuit then addressed several questions that the district court had not resolved, concluding that the plaintiffs all had standing to bring their claims and that the complaints stated a valid claim under the federal common law of public nuisance that had not been displaced by federal statutes (such as the Clean Air Act).⁷ Shortly after the Second Circuit’s decision in *American Electric Power*, courts in the Fifth and the Ninth Circuit weighed in on similar lawsuits,⁸ making it likely that the Supreme Court will soon address these tort-based global warming claims.

The court encountered another “political” question in *Dean v. Blumenthal*.⁹ There, a former candidate for the Office of Attorney General (Martha Dean) challenged a contractual prohibition on campaign contributions from, *inter alia*, employees of private law firms. Plaintiff asserted that the contractual prohibition, which law firms at one time accepted in order to do legal work for the Attorney General’s Office, violated her First Amendment right to receive campaign contributions, among other things. The district court granted defendant’s motion to dismiss, ultimately concluding that the plaintiff did not have a constitutional right to receive campaign contributions.

The Second Circuit affirmed the dismissal, for different reasons. According to the court, developments during the pendency of the case rendered moot several of the plaintiff’s prayers for relief (declaratory judgment, injunctive relief and for a cease-and-desist order prohibiting enforcement of the contracts). In December 2005, while Attorney General Blumenthal’s motion to dismiss the complaint was pending in the district court, the General Assembly passed campaign finance legislation that prohibited contributions from state contractors and prospective state contractors to certain committees affiliated with a candidate for the Office of Attorney General. Although the new statute did not preempt the identical conduct proscribed by the disputed contract provisions,¹⁰ the court noted that Attorney General Blumenthal had taken the position that the statutory ban “wholly and permanently superseded” any contractual provision in contracts with law firms.¹¹ According to the court, “the Attorney General’s claim is bolstered by his voluntary practice of not enforcing the contractual prohibition over the past six years and of deleting the contractual prohibition over two years ago.”¹² The court also affirmed the dismissal of plaintiff’s claim for monetary damages on alternate grounds. According to the court, regardless of whether plaintiff had a constitutional right to receive campaign contributions, that right “was not clearly established at the time of Blumenthal’s alleged misconduct, and Blumenthal is therefore entitled to qualified immunity.”¹³

Unlike *Dean*, the court did find a constitutional violation in *Cooper v. U.S. Postal*

Service,¹⁴ agreeing with the district court that religious displays at a contract postal unit (“CPU”) in Manchester, Connecticut, violated the Establishment Clause. CPUs are postal facilities operated on private property pursuant to revenue-sharing agreements with the United States Postal Service. Since June 2002, there has been a CPU in Manchester located at the Full Gospel Interdenominational Church (the “Church”). The church operated the CPU through a non-profit corporation, Sincerely Yours, Inc. (“SYI”). The interior of the CPU was similar in appearance to any post office—with a postal counter manned by SYI employees, post office boxes, and shelving units offering a variety of postal services. The exterior of the building displayed a sign with the familiar eagle logo of the postal service. The Manchester CPU also contained various religious displays, including among other things, prayer cards, a box located on the postal counter into which postal service customers can deposit prayer requests, and a television monitor displaying church-related videos on one side of the postal counter.

Plaintiff sued in October 2003, arguing that the Manchester CPU is a “state actor,” and the religious displays violate the Establishment Clause. District Court Judge Dominic J. Squatrito agreed, and ultimately ordered SYI to remove all religious displays and cease from acting in a manner that proselytizes or advances religion. The Second Circuit upheld the district court’s Establishment Clause analysis, in a unanimous decision written by Chief Judge Dennis Jacobs, but remanded to the district court to fashion a more narrow injunction that would better cure the violation. In so holding, the court held that SYI (operating the CPU) is a state actor “only as to those areas of its facility where the public function takes place, namely the postal counter, the postal boxes, and the shelving unit that stores and displays postal materials.”¹⁵ Accordingly, the district court’s injunction—requiring the removal of all religious displays and messages—was overbroad. Indeed, the court noted that “the removal of all religious messages would render the premises a single-use post office, and would prevent the second legitimate use to which the premises are dedicated.”¹⁶ According to the court: “[a] direct, effective and complete remedy for the violation is one that limits the public function to designated

public spaces and returns the remainder of the facility to SYI’s private purposes.”¹⁷ The court remanded for the district court to fashion a new injunction consistent with its opinion.

Switching to ferry passenger fees and the scarcely-cited Tonnage Clause, Connecticut commuters likely welcomed the court’s affirmance of Judge Droney’s decision in *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*.¹⁸ Defendant Bridgeport Port Authority (“BPA”) collected fees from passengers traveling by ferry from Bridgeport to Port Jefferson, Long Island. Plaintiffs (the ferry company and several passengers) challenged the constitutionality of the passenger fees under the Commerce Clause and the Tonnage Clause.¹⁹ District Court Judge Christopher F. Droney concluded that the fees were unconstitutional, entered judgment for the plaintiffs, awarded nominal damages to some plaintiffs, and enjoined the BPA from imposing such fees in the future. Key to that conclusion was the fact that, although the BPA provides services to the entire Port District—and not just to ferry passengers—the passenger fees collected from 1993 to 2004 correlated very closely with the BPA’s total operating expenses for the same period. Based on these facts, the district court concluded that the passenger fee failed the first two prongs of the dormant Commerce Clause test enunciated in *Northwest Airlines, Inc v. County of Kent*,²⁰ because the fee (1) was not “based on some fair approximation of use of the facilities,” and (2) was “excessive in relation to the benefits conferred.”²¹ The court also found a violation of the Tonnage Clause where the passenger fee “was used for the impermissible purpose of raising general revenues and for general projects which did not and could not benefit ferry passengers.”²²

The Second Circuit easily affirmed. Writing for the court, Judge Jon O. Newman rejected the BPA’s argument that the passenger fees were based on a fair approximation of the ferry passengers’ use and were not excessive in relation to the benefits the ferry passengers received: “The BPA correctly argues that there need not be a perfect fit between the use of the facilities and the support of those facilities by the fee, . . . but the discrepancy here exceeds permissible bounds.”²³ On the facts presented, the court held that

“[t]he limits of both a fair approximation of use and excessiveness are plainly exceeded when the fees support a BPA budget that includes, for example, a development project for reducing traffic on I-95, the interstate highway running generally along the Connecticut shore”—a project that would not “confer an actual or potential benefit on ferry passengers as users of the ferries.”²⁴ Similarly, the court affirmed the district court’s finding that the fees violated the Tonnage Clause because the passenger fee “is used for the impermissible purpose of raising general revenues and for projects which do not and could not benefit the ferry passengers.”²⁵

Last in the civil section is *Fortunato Garcia v. Hebert et al.*,²⁶ an unpublished decision from November 12, 2009. Although unpublished decisions are usually short and uneventful, this one warrants special mention. The case involved plaintiff’s civil rights complaint against prosecutors in the State’s Attorneys’ Office at the Connecticut Superior Court in Bantam, Connecticut. According to his complaint, when plaintiff appeared for an arraignment at the Connecticut Superior Court G.A. 18 in Bantam, a prosecutor “verbally and publicly abused” him, and then told him to go home without advising him of his right to counsel or his next court date. Plaintiff never appeared before the judge for his arraignment, although the court records (which plaintiff claimed were fabricated) indicated that plaintiff had personally appeared before the court, had been arraigned and advised of his rights, and had been directed to appear at his next court date, January 5, 2007. Plaintiff was later arrested for failure to appear. In his civil rights complaint, plaintiff alleged, among other things, that “the contrived use of the ‘Failure to Appear’ criminal charge by the Connecticut State’s Attorney’s Office is a statewide policy and practice designed to apply pressure on low-income and minority defendants to frighten and force them not to contest the original underlying charges.”²⁷ On the prosecutors’ motion to dismiss, District Court Judge Robert N. Chatigny accepted and approved Magistrate Judge Donna F. Martinez’s Recommended Ruling and dismissed the claims based on prosecutorial immunity.

The Second Circuit affirmed, in a short, unpublished summary order. Of note, how-

ever, the concluding paragraph of that order stated that the court was “disturbed by the allegations of prosecutorial conduct at issue and by the State of Connecticut’s ostensible refusal in its brief and at oral argument to admit that were those allegations true, the practices would be, if not unconstitutional, likely illegal and certainly improper.”²⁸ The court then ordered the Attorney General’s Office to provide the Second Circuit, within 30 days, with a “detailed report discussing what steps have been taken to address the practice of the State’s Attorney at the Connecticut Superior Court in Bantam, Connecticut, and what steps are being taken to ensure that they will not continue in the future.”²⁹ The Attorney General’s report to the court, submitted as a three-page letter on December 10, 2009, concluded that there was no prosecutorial misconduct in Bantam. According to the letter, the practice of sending defendants home before their arraignment in front of a superior court judge has stopped for reasons unrelated to the litigation.³⁰

Four Criminal Cases

Next we turn to four cases from the criminal side of the Second Circuit docket. In *United States v. Ionia Management S.A.*,³¹ the Second Circuit reviewed a guilty verdict following a jury trial before Judge Janet Bond Arterton convicting a ship management company of violating the Act to Protect Pollution from Ships (APPS),³² and imposing a criminal fine of \$4.9 million. The APPS implemented two related international marine environmental treaties comprising MARPOL.³³ The provision of the APPS at issue concerned the prevention of oil pollution by oceangoing vessels. The defendant, a ship management company incorporated in Liberia and headquartered in Greece, managed the *M/T Kriton*, a 600-foot oil tanker, a Bahamian flagged vessel. The *Kriton* delivered oil and petroleum products to ports up and down the East Coast of the United States, including Connecticut, New York, Florida, and the U.S. Virgin Islands.³⁴ The crew of the *Kriton* routinely discharged oily wastewater directly to the ocean through a “magic hose” that bypassed the ship’s onboard oil filtration equipment. The crew then made false entries into its oil record book (ORB) to conceal the illegal discharges.

The primary legal issue before the Second Circuit was whether the APPS and its regu-

lations requiring maintenance of an ORB merely required the defendant to possess an ORB (as the defendant argued), or to *accurately* keep the ORB (as the government argued). Not surprisingly, the Second Circuit sided with the government, holding that any other interpretation would be contrary to the plain text of the APPS regulations, and would defeat the fundamental purpose of MARPOL and the APPS—i.e., preventing pollution on the high seas.

We flag this case because of an amicus brief filed by a number of leading corporate and criminal defendant’s associations—including the Association of Corporate Counsel, the U.S. Chamber of Commerce, the National Association of Criminal Defense Lawyers, and the National Association of Manufacturers—that raised an interesting legal argument on corporate vicarious liability. They argued that, in light of recent Supreme Court decisions restricting civil corporate vicarious liability, similar heightened standards should be imposed in the criminal context. *Amici curiae* suggested that the Second Circuit add a new element to the prosecution’s burden: In order to hold a corporation criminally vicariously liable, the government must prove that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees. In essence, *amici curiae* argued that a corporation should be able to assert a due diligence defense to corporate vicarious liability.

The Second Circuit rejected this argument because it was raised only by *amici curiae*—and not by the defendant—and it was contrary to established Second Circuit precedent. *Ionia* was probably not the best case to assert such an argument, considering the substantial evidence of management’s involvement in the decision to use the “magic hose,” and the fact that defense counsel never objected to the jury instruction on corporate vicarious liability. However, we suspect this may be only the beginning of a dialogue between corporate defendants and their counsel, government authorities, and the courts on this issue.

Our next case, *United States v. Rocky Samas*,³⁵ involves a defendant who pled guilty to a number of drug trafficking crimes, and was sentenced by Judge Janet C. Hall to the mandatory minimum of 240 months’ im-

prisonment for possession with intent to distribute 50 grams or more of crack cocaine. On appeal, Samas argued that his equal protection rights were violated because there was and is no rational basis for the disparity between the statutory mandatory minimum sentences for powder cocaine compared to crack cocaine. The crack versus powder cocaine disparity originated in the Anti-Drug Abuse Act of 1986.³⁶ This Act adopted a “100-to-1 ratio” that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. Although the Sentencing Commission adjusted the crack guidelines downward by roughly 20 percent in November 2007, and made this change retroactive in March 2008, Congress has not altered the statutory mandatory minimums for crack cocaine offenses.

On appeal, Samas primarily relied on *Kimbrough v. United States*,³⁷ in which the Supreme Court held that “the cocaine Guidelines, like all other Guidelines, are advisory only,” and that a sentencing judge has discretion to “consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses” so long as the court does not “purport to establish a ratio of its own.”³⁸ Samas argued that *Kimbrough* cast doubt on the continued vitality of any and all of the sentencing disparities between powder and crack cocaine, whether guideline or statutory. The Second Circuit disagreed, holding that *Kimbrough* only bears upon the “discretion of district judges to sentence within the

mandatory minimum and maximum brackets set by the federal narcotics statutes,” but does not alter the Second Circuit’s prior precedent rejecting constitutional challenges to disparities in the mandatory statutory sentencing scheme itself.³⁹

In *United States v. John W. Bell*,⁴⁰ the Second Circuit reviewed the government’s appeal from Judge Alfred V. Covello’s grant of a new trial. The case involved a shootout between FBI agents and the defendant at a gas station in Bridgeport, Connecticut, ignited by the agents’ attempt to execute a search warrant as part of an investigation into a gambling organization. According to their testimony, the agents were wearing bullet-proof vests emblazoned with the word “POLICE” across the front and back in bright yellow letters, and announced that they were the police executing a search warrant. The defendant testified that he fired his gun at the agents in self-defense, claiming that he thought he was being robbed. The jury, believing the agents, convicted the defendant of attempted murder of a federal officer (among other offenses). On defendant’s motion, Judge Covello granted a new trial based on two legal mistakes the court identified *sua sponte*: (1) a flawed definition of “intentional” conduct in the jury instructions, and (2) the use of a general verdict form instead of special interrogatories that would have addressed each element of the charged offenses and the defense of self-

defense. The district court also found that there was insufficient evidence to prove beyond a reasonable doubt that the defendant did not act in self-defense.

The Second Circuit rejected the district court’s conclusion that its jury instructions were flawed, observing that the challenged instructions employed the precise language required by Second Circuit precedent (language which is also found in *L. Sand et al. Modern Federal Jury Instructions*).⁴¹ Moreover, the jury instructions as a whole repeatedly made clear that the jury needed to find that the defendant’s actions “were the product of intent rather than accident.”⁴² As for the district court’s finding that it should have given special interrogatories, the Second Circuit noted the preference for general verdicts in criminal cases, and held that special interrogatories were unnecessary because the district court “more than adequately addressed the issue of self-defense and its importance” in the rest of the jury charge.⁴³ Finally, the Second Circuit concluded that there were no exceptional circumstances that would justify the district court’s usurpation of the traditional jury function of conducting credibility assessments of the various witnesses, and concluded that on the record as a whole, it was not clear that it would be a manifest injustice to let the guilty verdict stand.⁴⁴

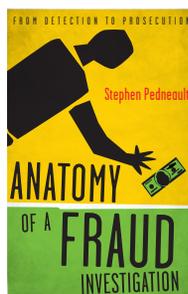
Finally, we turn to *United States v. Leon Williams*,⁴⁵ a case that originated outside the District of Connecticut, but affects sentencing in gun and drug cases throughout the Circuit.⁴⁶ In *Williams*, the defendant was convicted of a drug trafficking crime which carried a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), and of possession of a firearm in furtherance of that drug trafficking crime, an offense which carried a five-year mandatory minimum consecutive sentence under 18 U.S.C. § 924(c). Normally—or at least until the Second Circuit’s ruling last year in *United States v. Whitley*⁴⁷—a mandatory minimum sentence for a § 924(c) conviction runs consecutively to the underlying drug or violent crime. However, *Whitley* upended the prior interpretation of the introductory clause of § 924(c), which states in relevant part that these additional mandatory minimum sentences apply “Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other

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provision of law”⁴⁸ *Whitley* held that this “except” clause in the statute “means what it literally says”: a § 924(c) consecutive mandatory minimum sentence is inapplicable where the defendant is subject to a longer mandatory minimum sentence for drug or violent crime arising from the same operative set of facts or criminal transaction.⁴⁹ In *Whitley*, the underlying mandatory minimum was associated with another gun crime—fifteen years’ imprisonment under the Armed Career Criminal Act,⁵⁰ compared to the defendant’s ten-year mandatory minimum term of imprisonment under § 924(c). In *Williams*, the government argued that *Whitley* should only be applied where the “other provision of law” was another gun offense. The government also argued—as it did in *Whitley*—that this reading of the “except” clause would be contrary to the fundamental purpose of the statute, which was to enhance the mandatory criminal penalties for the use of a gun during a violent or drug trafficking crime. The Second Circuit in *Williams*, bound by its prior ruling in *Whitley*, rejected these arguments, and simply held that the “other provision of law” meant

any higher mandatory minimum imposed by a conviction for any drug or violent crime arising from the same criminal transaction or operative set of facts.⁵¹

The Second Circuit’s interpretation of the provision is at odds with that of other circuits, thus creating a circuit split that may ultimately be resolved by the Supreme Court. As of this writing, the First, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have rejected the Second Circuit’s interpretation. In fact, the Seventh Circuit rejected the *Whitley/Williams* approach in response to an *Anders* motion, ultimately holding that “it would be frivolous to argue that a district court is barred from imposing any sentence at all for a § 924(c)(1) count when some other count of conviction requires a greater mandatory minimum.”⁵²

While hardly a comprehensive summary of the work of our Circuit Court, we have attempted to capture significant cases originating from the District of Connecticut or impacting our District. We will continue to monitor the decisions of the court and we look forward to reporting to you again next year. **CL**

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Notes

1. 582 F.3d 309 (2d Cir. 2009).
2. *Id.* at 320.
3. 369 U.S. 186, 210 (1962). In *Baker*, the court set forth six “formulations” that “may describe a political question,” including, for example, where there a textually demonstrable constitutional commitment of the issue to a coordinate political department, or where it would be impossible for judicial resolution without expressing lack of the respect due coordinate branches of government. *Id.* at 217.
4. 582 F.3d at 326.
5. *Id.* at 332.

(continued on page 33)

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could hold that terminating an employee because the employer fears violence from the abuser is not a violation of public policy. Also, another superior court could hold that whether terminating a victim of domestic abuse is or is not a violation of public policy, it is a decision best made by the legislature and absent an express legislative prohibition against doing so, conclude that public policy does not ban it. Therefore, absent a definitive ruling of the Connecticut Supreme Court or legislative action, legal uncertainty surrounds a victim who is terminated. Those victims must now weigh not only their physical safety, but also their financial safety, when deciding whether to report the abuse or to seek protection.⁹

In contrast to Connecticut, New York now treats victims of domestic violence as a protected class, like race, sex, and religion.¹⁰ Connecticut should do likewise. **CL**

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Notes

1. *Imes v. City of Asheville*, 163 N.C. App. 668, 594 S.E.2d 397, *aff'd* 359 N.C. 182, 606 S.E.2d 117 (2004). Because the appeal was based on a motion to dismiss, the court assumed the facts pled were true.
2. *Imes*, 594 S.E.2d at 399, quoting *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992).
3. *Imes*, 594 S.E.2d at 400.
4. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 192 P.2d 128 (2008).
5. *Danny*, 165 Wn at 22-23, 192 P.2d at 139.
6. *Rayburn v. Wady Industries, Inc.* (2008 U.S. DIST. LEXIS 29614, 27 I.E.R. CAS. (BNA) 785 (N.D. Iowa 2008).
7. Docket Number: CV 09 5011135S, Superior Court, Judicial District of New London at New London.
8. In *Gillies v. Stonington Free Library*, the court was ruling on a Motion to Strike. In doing so the court was required to "take as true the facts alleged in the plaintiff's complaint." *Heim v. Calif. Fed. Bank*, 78 Conn. App. 351, 359, *cert. denied*, 226 Conn 911 (2003). For purposes of this article I have presented the facts they are alleged in the complaint. Of course, those facts may be contested in this case or in other proceedings.
9. L'Nayim A. Shuman-Austin, *Is Leaving Work to Obtain Safety 'Good Cause' to Leave Employment?* 23 Seattle U. L. Rev. 797 (2000) (domestic violence results in increased medical, health, and leave expenses and "dramatically affects women's workforce participation").
10. N.Y. Exec. Law § 296.

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6. *Id.*
7. *Id.* at 349-88.
8. *See, e.g., Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009) (reversing dismissal of certain tort-based global warming claims); *Native Village of Kivalina v. ExxonMobil et al.*, 2009 U.S. Dist. LEXIS 99563 (N.D. Cal. Sept. 30, 2009) (dismissing similar claims as non-justiciable).
9. 577 F.3d 60 (2d Cir. 2009).
10. The statute applies only to contracts in excess of \$50,000, whereas the disputed contract provisions did not have a monetary threshold.
11. *Id.* at 64.
12. *Id.* at 65.
13. *Id.* at 66 (applying the two-part qualified immunity test from *Saucier v. Katz*, 533 U.S. 194 (2001) as recently modified in *Pearson v. Callahan*, 129 S. Ct. 808 (2009)).
14. 577 F.3d 479 (2d Cir. 2009). The authors' colleagues at Wiggin and Dana represented the appellees.
15. *Id.*
16. *Id.* at 496.
17. *Id.*
18. 567 F.3d 79 (2d Cir. 2009).
19. Art. I, § 10, cl. 3 of the United States Constitution (aka "the Tonnage Clause") provides that "[n]o state shall . . . lay any Duty of Tonnage."
20. 510 U.S. 355 (1994).
21. 567 F.3d at 84 (citing *Northwest Airlines*, 510 U.S. at 369).
22. *Id.* at 85.
23. *Id.* at 86 (citation omitted).
24. *Id.* at 87.
25. *Id.* at 88.
26. 09-1615, 2009 U.S. App. LEXIS 24901 (Nov. 12, 2009).
27. *See generally* Recommended Ruling on Motion to Dismiss, Case No. 3:08CV95 (RNC) (available on PACER).
28. No. 09-1615-CV, 2009 U.S. App. LEXIS 24901, at *2.
29. *Id.* at *2-3.
30. *See* Docket No. 09-1615 (Dec. 10, 2009); *see also* Christian Nolan, *AG's Office Clears Prosecutors*, 35 CONN. L. TRIB. 1 (Dec. 28, 2009).
31. 555 F.3d 303 (2d Cir. Jan. 20, 2009) (per curiam).
32. 33 U.S.C. § 1908(a).
33. MARPOL refers to the 1973 International Convention for the Prevention of Pollution from Ships, and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships.
34. Four separate indictments in each of these districts were consolidated for trial in Connecticut.
35. 561 F.3d 108 (2d Cir. Mar. 24, 2009) (per curiam).
36. 100 Stat. 3207.
37. 552 U.S. 85 (2007).
38. *Id.* at 92, 111.
39. *Samas*, 561 F.3d at 110.
40. 584 F.3d 478 (2d Cir. Oct. 20, 2009) (per curiam).
41. *Id.* at 484.
42. *Id.*
43. *Id.* at 484-85.
44. *Id.* at 485.
45. 558 F.3d 166 (2d Cir. Mar. 5, 2009) (Pooler, J.).
46. The United States Attorney's Office for the District of Connecticut has already pursued a rare appeal in *United States v. Huckabee*, Docket No. 09-1308-cr, where the district court declined to impose a mandatory consecutive sentence relying on *Williams*. In its appellate brief the government acknowledged the district court was bound by *Williams* but argued that it was appealing to preserve appellate rights because *Williams* was wrongly decided.
47. 529 F.3d 150 (2d Cir. 2008).
48. 18 U.S.C. § 924(c)(1)(A).
49. *Whitley*, 529 F.3d at 153.
50. 18 U.S.C. § 924(e).
51. *See Williams*, 558 F.3d at 170-72.
52. *United States v. Easter*, 553 F.3d 519, 527 (7th Cir. 2009). *See also United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008) (implying that the *Whitley/Williams* reading of the "except" clause in § 924(c) is "suspect on its face").



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